No. 02-626

In the Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* FORMER ADMINISTRATOR CAROL M. BROWNER, FORMER ASSISTANT ADMINISTRATORS CHARLES FOX AND ROBERT W. PERCIAEPE AND FORMER GENERAL COUNSELS JONATHAN Z. CANNON AND JEAN I. NELSON OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY IN SUPPORT OF RESPONDENTS

RICHARD J. LAZARUS
COUNSEL OF RECORD
GEORGETOWN UNIVERSITY LAW CENTER
600 NEW JERSEY AVENUE, N.W.
WASHINGTON, D.C. 20001
(202) 662-9129

Attorney for Amici

QUESTION PRESENTED

The Clean Water Act defines a "point source" as "any discernible, confined, and discrete conveyance including * * * any pipe" and further defines the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1362(12)&(14). Petitioner operates a pumping station that consists of three pipes, each of which conveys 960 cubic feet of water per second containing high concentrations of phosphorous into a pristine body of navigable waters within the Florida Everglades. The question presented is:

Whether petitioner's operation of its three pipes constitutes a "discharge of a pollutant," within the meaning of the Clean Water Act.

Table of Contents

Table of Authorities

Cases:

Cases (continued):

Statutes and Regulations:

Statutes and Regulations (continued):

Statutes and Regulations (continued):

Miscellaneous:

Miscellaneous (continued):

INTEREST OF AMICI CURIAE

Amici Curiae are a former Administrator, Assistant Administrators, and General Counsels of the United States Environmental Protection Agency.[1] They were each once responsible for administering the Clean Water Act. These responsibilities extended to overseeing the interpretation of the statutory provisions in dispute in this case in general rulemakings and specific permit adjudications. Each amicus has a longstanding professional expertise relevant to the question presented and a strong personal interest in this Court's accurate resolution of the important legal issue raised in this case and the protection of the nation's waters.

At stake in this case is the jurisdictional scope of the Clean Water Act's regulation of point source discharges, which is the single most important aspect of that Act. The statutory constructions advanced by petitioner and their amici, including the Solicitor General, are erroneous, contrary to well-settled understandings, and would devastate the statute's ability to achieve its water quality protection goals.

Under petitioner's view, any point source that did not itself generate in the first instance the pollutants that it conveyed would escape the Section 402 permit requirement. This exemption would extend to many of the most significant point source discharges currently regulated by the Water Act. The Solicitor General's proposed construction of the law is narrower -- all point source discharges between different bodies of navigable water would be exempted -- but at the end of the day would likewise seriously frustrate the law's purposes. A fuller description of the backgrounds of the individual amici is set forth in an appendix to this brief.

---

[1] This brief is filed with the parties' written consent, copies of which have been filed with the Clerk. Pursuant to Rule 37.6, Amici affirm that no counsel for any party authored this brief in whole or in part. Only amici or their counsel made a monetary contribution for the preparation or submission of this brief.

STATEMENT

Amici adopt the Statement set forth in respondents' briefs.

INTRODUCTION AND SUMMARY OF ARGUMENT

According to petitioner, the conveyance by three massive pipes of 960 cubic feet per second of heavily polluted water into a pristine body of navigable waters does not constitute an "addition of any pollutant to navigable waters from any point source" within the meaning of the Clean Water Act, 33 U.S.C. § 1362(12). The plain meaning of the statutory language compels rejection of that argument.

Every element of a point source discharge is presented by the facts of this case. The statute expressly defines "point source" to include a "pipe." The phosphorous that those pipes convey are clearly "pollutants." And, the receiving waters to which those pipes directly add their contaminated effluent are indisputably "navigable."

Resisting the plain meaning of the statutory language, petitioner contends that affirmance of the court of appeals' judgment would transgress principles of federalism by subjecting water allocation management to federal water pollution control requirements. Petitioner's reliance, however, on principles of federalism and related canons of statutory construction is triply misplaced.

1. First, the only canon of statutory construction relevant to this case is that where, as in this case, the meaning of the relevant statutory language is clear, that is the end of the judicial inquiry. No matter how many powerful entities may prefer a different policy result, the short answer is that the courts are not the constitutionally accepted avenue for securing an amendment of an Act of Congress. Indeed, the presence of so many powerful interests in support of petitioner's preferred policy simply underscores the fundamental importance of safeguarding the exclusive constitutional design for lawmaking. There is certainly little reason for concern that these same entities will prove powerless to have their voices heard in the halls of Congress.

2. The exaggerated claims set forth by petitioner and its amici of the dire consequences of affirming the judgment below are, moreover, completely misdirected. There will be no widespread imposition of federal water pollution control requirements on state water allocation programs. The kind of direct pumping of large amounts of pollutants from one body of water to another distinct pristine water body presented by this case is readily distinguishable from traditional water allocation and management activities undertaken by state and local governments. The Clean Water Act already expressly excludes from Section 402 permit requirements the vast majority of those traditional water allocation activities, including all withdrawals from water bodies and all irrigation return flows. And, even for any other traditional water allocation programs for which an exclusion is not so clear on the face of the statute, there is sufficient statutory ambiguity, as applied to those programs, to provide EPA with the clear discretionary authority to construe the permitting requirements not to apply.

3. The third flaw in petitioner's federalism argument is that it fundamentally misapprehends the actual role that States play in the operation of the Clean Water Act's Section 402 permit program. By deliberate congressional design, it is the States, not EPA, that are primarily responsible for the administration of virtually all aspects of the Clean Water Act Section 402 permit program.

The States can assume primary responsibility for administering the Section 402 permit program and 47 States, including Florida, have chosen to do just that. These States, not EPA, issue the Section 402 permits. And, as the permitting agencies for the kinds of nonindustrial discharges at issue here, they possess considerable discretion in crafting permit requirements. The Clean Water Act, accordingly, promotes rather than transgresses State sovereignty.

4. Finally, while the Solicitor General correctly rejects petitioner's core arguments, his competing interpretation of

the Act -- as exempting discharges between distinct bodies of navigable water -- is also defeated by the plain meaning of the statutory language. The Solicitor General's position is, moreover, flatly inconsistent with the views of EPA, as authoritatively expressed by that Agency as long ago as 1975. It is, moreover, the formal interpretation of EPA, not that expressed in a brief filed by the Solicitor General in litigation on behalf of the "United States," that is entitled to judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

ARGUMENT

The judgment of the Eleventh Circuit should be affirmed. It is consistent with the Clean Water Act's plain meaning, statutory structure, and legislative history, EPA's longstanding interpretation, and Congress's revisions of the law. The doomsday rhetoric of petitioner and its amici, notwithstanding, none of their proffered canons of statutory construction for defeating the statute's plain meaning has any bearing on this case. The operation of petitioner's three massive pipes, each of which conveys 960 cubic feet per second of heavily polluted water into a pristine body of navigable waters, is just what it appears to be: an "addition of any pollutant to navigable waters from any point source" requiring a Section 402 permit. 33 U.S.C. §§ 1342, 1362(12).

I. The Plain Meaning of the Clean Water Act Compels the Conclusion that Petitioner's Three Pipes Result in Point Source Discharges

"As in any case of statutory construction, [this Court's] analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999), *quoting* Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992). The plain meaning of the Clean Water Act provides just such a "clear answer" to the question presented in this case: The Act's Section 402 permit requirements apply to the operation of petitioner's pumping

station, including its conveyance of contaminated water through three pipes into navigable waters.

A. Petitioner's Pipes Result In Point Source Discharges Because They Are Discernible Conveyances That Add Pollutants To A Navigable Water Body

1. It is common ground that whether petitioner's pumping station S-9 requires a Section 402 permit turns on whether its operation constitutes a "discharge of any pollutant," within the meaning of Section 301 of the Act, 33 U.S.C. § 1311. It is further common ground that in Section 502, 33 U.S.C. § 1362, Congress expressly provided definitions for several of the Water Act's statutory terms, including the three terms most relevant to determining the scope of Section 402: (1) "discharge of a pollutant"; (2) "pollutant"; and (3) "point source." Each of these statutory definitions is set forth below:

> The term *"discharge of a pollutant"* * * * means * * * "any addition of any pollutant to navigable waters from any point source * * *. 33 U.S.C. §1362(12).
>
> The term *"pollutant"* means * * * solid waste, * * * sewage, * * * chemical wastes * * * or discarded * * * industrial, municipal, and agricultural waste discharged into water. 33 U.S.C. § 1362(6).
>
> The term *"point source"* means any discernible, confined, and discrete conveyance, including but not limited to any pipe * * *. 33 U.S.C. §1362(14).

Petitioner's operation of the three pipes in pumping station S-9 clearly results in a "discharge of any pollutant" within the plain meaning of the Clean Water Act, especially as expressly provided for by the Act's specific definitions. The pipes are without a doubt each a "point source," given that the statutory definition of point source expressly extends to "any pipe." Nor does either petitioner or the Solicitor General here contest that the waters of Water Conservation

Area-3A (WCA-3A) in which those pipes each pump 960 cubic feet of contaminated effluent per second constitute "navigable waters," within the meaning of the Water Act.

The only remaining statutory inquiries, therefore, are whether the operation of these pipes results in an "addition" of pollutants "from" the pipes "to" the receiving body of navigable waters. Here, too, the facts of the case compel an affirmative response. The pipes each convey effluent into the WCA-3A that contains concentrations of phosphorous far higher than those already in the receiving waters. The pipes are the immediate, proximate source of the phosphorous pollutants in the WCA-3A. They are not some remote, incidental but-for cause. Hence, it cannot be seriously gainsaid that there is an "addition" "from" the pipes "to" the WCA-3A of "pollutants."

2. Petitioner nonetheless gamely disputes (Br. 26-29) that the operation of its three pipes constitutes a "discharge" on three distinct, yet ultimately closely related, grounds. According to petitioner, the pipes do not result in an "addition," do not convey "pollutants," and any pollutants that are conveyed by the pipes are not "from" the pipes even if the pipes might otherwise satisfy the definition of a "point source." Each of these arguments rests on the same central fact: the phosphorous did not originate in the point source but was the result of runoff into waters that were subsequently conveyed by petitioner's point sources into the WCA-3A. According to petitioner, the phosphorous lost its status as a "pollutant" prior to reaching petitioner's pipes, petitioner's pipes cannot be deemed to have "add[ed]" pollutants already in water, and the phosphorous cannot be fairly deemed to be "from" petitioner's pipes.

"Were it not for the hundreds of pages of briefing [petitioner and their amici] have submitted on the issue, one would have thought it fairly clear that this text does not permit" any such possible reading of the Clean Water Act. Cf. Whitman v American Trucking Ass'n, 531 U.S 457, 465

(2001). As posed by the Clean Water Act, whether a "discharge" exists turns on whether there is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The only "navigable waters" relevant to that statutory inquiry are the *receiving waters*, or the WCA-3A in this case. And the only relevant question is whether, vis a vis these receiving waters, there was an "addition" of phosphorous "to" these waters and whether that addition came "from" petitioner's three pipes. The indisputable answer to all these questions is "yes."

There is absolutely nothing in the statute's definition of "pollutant" to admit of an interpretation that a pollutant such as phosphorous loses its status as a pollutant (and becomes merely "pollution") once it is being conveyed by water. Nor is there even the remotest ambiguity presented by the term "from" to allow for petitioner's extraordinary claim that the point source must itself be the original source of the pollutant for the pollutant to be "from" the "point source." After all, "point source" is specifically defined to include a "conveyance" (33 U.S.C. § 1362(14)), which is hardly consistent with petitioner's claim that the point source must itself somehow generate the pollutant.

No doubt that is why publicly owned treatment works (POTWs), which often do no more than filter out and pass through to navigable waters pollutants originating from nonpoint sources, are subject to regulation as point source discharges under the Clean Water Act. See 33 U.S.C. §§ 1311(a)-(b); see *e.g.*, *id.* § 1311(h) (referring "to the discharge of any pollutant from a publicly owned treatment works"). POTWs do not necessarily generate or otherwise create pollutants in the first instance; yet the Act treats them as point source dischargers subject to Section 402.[2]

---

[2] EPA has promulgated programs for other comparable point source discharges that, like the discharges at issue in this case, originated in nonpoint source runoff. See, *e.g.*, *Combined Sewer Outfall Control*

Indeed, petitioner's notion of causation underlying its proffered definition of "from" would turn traditional notions of causation wholly on their head. See Sir Francis Bacon, The Elements of the Common Lawes of England, Reg. I (1630) ("*In jure non remota causa sed proxima spectatur.*"). The immediate, most proximate cause of an injury to receiving waters – in this case, petitioner's three pipes – would fall outside the scope of regulation. Instead only the original source of the phosphorous, far removed in time and space from the ultimate injurious actions deliberately taken by petitioner's three pipes in pumping massive amounts of contaminated water into the WCA-3A, would be considered the exclusive legal cause of the injury.

B. EPA's Consistent Interpretation of the Clean Water Act And Its Congressional Amendment Confirm The Statute's Plain Meaning

The statute's plain meaning is further confirmed by EPA's consistent administrative interpretation of the relevant provisions as well as by subsequent congressional amendment of the Act.

1. In 1973, just months after Congress passed the statute, EPA conducted a formal rulemaking in which it concluded that when rain runoff from agricultural and silvicultural activities ultimately reached pipes, ditches and channels, any effluent containing chemical contaminants conveyed by those pipes, ditches, and channels into navigable waters constituted point source "discharges of a pollutant," within the meaning of the Clean Water Act. See *Form and Guidelines Regarding Agricultural and Silvicultural Activities*, 38 Fed. Reg. 18000 (1973). As carefully explained by the EPA General Counsel in a formal opinion issued on August 3, 1973, discussing the legal status of runoff from farms and other activities that flows into pipes and ditches that convey that

---

Policy, 59 Fed. Reg. 18688, 18689 (1994) ("CSOs are point sources subject to NPDES permit requirements.").

effluent into navigable waters, "there is little doubt that conveyances meeting the definitional requirements of § 502(14) are point sources; whether such conveyances appear on farms or elsewhere. Accordingly, it is not legally tenable to treat farm discharges as nonpoint sources." EPA General Counsel Opinion (August 3, 1973), *Authority to Exclude Point Sources from the Permit Program, reprinted in* U.S. EPA General Counsel Opinions (Envt'l Law Pub. Serv. 1979). Hence, as early as 1973, EPA squarely rejected petitioner's claim that the pollutants must originate in the point sources themselves rather than, as the statute expressly provides, be simply the "conveyance" of pollutants that reached waters prior to the point sources.[3]

EPA's current regulatory definition of "discharge of a pollutant" is to the same effect. It defines the term as including "additions of pollutants into waters of the United States: from surface runoff collected or channeled by man * * *." 40 C.F.R. § 122.2. Of course, such a "chanel[ling]" of runoff is precisely what petitioner claims, notwithstanding EPA's regulation, is not a discharge even when deliberately pumped into a navigable water body.[4]

2. Formal actions taken by Congress since 1972 likewise

---

[3] To be sure, in this same rulemaking, EPA construed the Clean Water Act as allowing the Agency to exempt by regulation certain kinds of point source discharges from the permit requirement as a matter of administrative agency discretion, but *not* on the ground that the point sources did not plainly constitute "discharges." However, the D.C. Circuit, in *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) ruled that "the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of § 402."

[4] No doubt that is why the Florida Department of Environmental Protection apparently treats as point source discharges subject to Section 402 analogous activities of petitioner that manage nutrients contained in stormwater. See note 11, *infra*.

make clear that Congress shares EPA's view of the plain meaning of point source discharges regulated by Section 402. Soon after EPA declared its view of the meaning of point source and the D.C. Circuit ruled that EPA must regulate all such sources pursuant to Section 402 (NRDC v. Costle, 568 F.2d 1369 (D.C. Cir. 1977)), Congress enacted a specific amendment to the definition of point source to exclude irrigation return flows. See 33 U.S.C. § 1362(14). By narrowly singling out for statutory exemption just this one category out of many runoff-related point sources covered by EPA's interpretation and the D.C. Circuit's ruling, Congress essentially acquiesced in the inclusion of those other sources as discharges subject to Section 402.

Congress's similar decision in 1987 to exempt from Section 402 permit requirements certain other "stormwater runoff," particularly that resulting from "oil, gas, and mining operations" (33 U.S.C. § 1342(l)(2)) provides even further support for our view that Congress in no manner embraced petitioner's understanding of a point source. See Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7, 65-66 (1987). Congress expressly defined the exempted category as "discharges of stormwater runoff [specific mining and oil and gas operations] composed entirely of flows which are from conveyances * * * used for collecting and conveying precipitation runoff and which are not contaminated by contact with * * * any overburden, raw material, intermediate products, finished products, byproduct, or waste products located on the site of such operations." *Id.* Of course, if petitioner were correct about its interpretation of the meaning of "discharge of a pollutant" any such statutory exemption would have been wholly unnecessary; such point source conveyances of runoff wherein the point source did not itself create the pollutants would already be exempt.

3. Finally, there is no merit in petitioner's contention that this Court should read Sections 101(g) and 304(f) as implicitly amending the Clean Water Act's express definition

provisions so as to create an exemption for all "movement" of water that States may otherwise regulate. Neither of these statutory "mouseholes" could remotely sustain the "elephant" petitioner finds in them. Whitman v. American Trucking Ass'n, 531 U.S. at 468.

Section 101(g) simply declares general congressional policy not to impair State water allocation authority. It does not purport to modify the Act's plain meaning or create a "water movement" exception to point source discharges. As this Court explained in *Public Utility Dist. No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700, 720 (1994), "Section[] 101(g) preserve[s] the authority of each State to allocate water quantity as between users; [it] do[es] not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation."

In all events, "the authority of each State to allocate quantities of water within its jurisdiction" is not called into question by the decision below. See 33 U.S.C. § 1251(g). Petitioner here is not just engaging in water allocation. It is discharging pollutants through point sources into navigable bodies of water. Were Section 101(g) read, as petitioner suggests, to exempt from Clean Water Act jurisdiction all discharges of pollutants that result from conveyances of water, Section 301's ban on discharges of pollutants in the absence of a permit would be quickly rendered a legal nullity. Hardly a point source discharge occurs in the absence of water being utilized as the transporting medium.

Section 304(f)(2) is likewise beside the point. To be sure, Section 304(f)(2)(F) instructs the EPA Administrator to issue information to Section 208 planning agencies "information including * * * processes, procedures, and methods to control pollution resulting from * * * changes in the movement, flow, or circulation of any navigable waters * * * including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." But it has been settled law for decades that not every one of those activities

described in Section 304(f)(2) pertains exclusively to nonpoint sources and that many of those same activities, which extend to runoff from agricultural, silvicultural, mining, and construction, are sometimes point sources and sometimes nonpoint sources. Both the federal courts of appeals and EPA have long expressed that view.[5]

In any event, this is not a case where the court below ruled (or where we contend) that water quality problems caused by mere "movement, flow, or circulation" or navigable waters are subject to NPDES permits. It is only point source conveyances of waters that contain *pollutants* to receiving navigable waters that fall within the scope of Section 402 .

* * * * *

In short, wholly missing from the 30-year history of the Clean Water Act's administration by EPA and its revision by Congress is even a scintilla of support for petitioner's strained reading of the statute, which they nonetheless presumably advance as the Act's plain meaning. Instead, the actions of both EPA and Congress are entirely in harmony with the plain meaning embraced by the court of appeals below, which we urge this Court to uphold.

C. Petitioner's Reading Threatens Well Established And Important Clean Water Act Programs

1. Indeed, because EPA's settled administrative interpretation is inconsistent with petitioner's position, were this Court to embrace petitioner's reading of the jurisdictional scope of Section 402, such a ruling would call

---

[5] See U.S. v. Earth Sciences, Inc. 599 F.2d 368, 372 (10th Cir. 1979) ; Sierra Club v. Abston Construction Co. 620 F.2d 41, 44 (5th Cir. 1980); NRDC v. Costle, 568 F.2d at 1377; EPA General Counsel Opinion (August 3, 1973), *Authority to Exclude Point Sources from the Permit Program* ("To be sure, sections 208(b)(2)(F) and 304(e) indicate that Congress thought that some agricultural runoff would not be a point source. However, these sections cannot be read to mean that pipes, ditches, etc., are not point sources when they occur on farms.").

into question the legality of a vast number of longstanding and important Clean Water Act programs. Point source regulation of stormwater discharges, combined sewer outfalls, and runoff from mining, construction, and agricultural activities that flow into discrete point sources would all potentially fall outside the scope of Section 402.

Decades of federal court of appeals rulings upholding the applicability of Section 402 to a wide variety of point source discharges would likewise be upset. Courts long ago ruled that point source discharges subject to Section 402 include contaminated runoff from mining processes that flow through ditches into navigable waters (Sierra Club v. Abston Construction Co., 620 F.2d 41 (5th Cir. 1980); U.S. v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979)) and stormwater runoff discharged by sewer systems directly into navigable waters (Montgomery Environmental Coalition v. Costle, 646 F.2d 568, 592 (D.C. Cir. 1980)). Appellate courts have uniformly ruled that NPDES permit requirements are not precluded simply because the pollutants first entered water prior to being conveyed by a discrete conveyance, such as a pipe, into a distinct navigable water body.[6]

Finally, Section 402 enforcement would be seriously hampered. Whether a point source exists would turn on facts far removed from the immediate characteristics of the conveyance and the receiving waters. The distant origins of the pollutants and intake waters would require discovery.

2. Nor would the resulting environmental impact of removing all these point source discharges from Section 402 permit requirements be negligible. It is well established

---

[6] See, *e.g.*, Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 491 (2d Cir. 2001); Dubois v. U.S. Dept. of Agric., 102 F.3d 1273, 1299 (1st Cir. 1996); Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist., 13 F.3d 305, 308-09 (9th Cir. 1993); Dague v. City of Burlington, 935 F.2d 1343, 1354-5 (2d Cir. 1991), rev'd in part on other grounds, 505 U.S. 557 (1992) .

today that these kinds of point sources are the primary source of water quality degradation in many parts of the nation. The facts of this case underscore the significance of such point source discharges to water quality. Petitioner's three pipes are discharging massive amounts of phosphorous into a pristine body of water within the Everglades. As described by the Solicitor General in his brief filed in this case at the jurisdictional stage (Juris. Br. 3, *citing* Pet. App. 16a-17a), "[p]hosphorus levels are a defining element of the Everglades. In its natural state, the Everglades system * * * contains only limited amounts of phosphorus * * *. Adding phosphorus above natural levels causes an imbalance in the native flora and fauna and results in harmful growth."

D. The Solicitor General's Alternative Interpretation Of the Clean Water Act Is Equally Flawed

The Solicitor General correctly rejects (Merits Br. 13) petitioner's core argument "that pollutants can be added 'from' a point source only if the point source itself generates or is the originating source of the pollutants." Consistent with our view, the Solicitor General stresses (*id.* at 22 n.7) that petitioner's legal theory would be "inconsistent with the Clean Water Act's manifest aim to impose permitting requirements on facilities, such as publicly owned treatment works and municipal storm sewer systems, that do not themselves generate the pollutants in the water they treat, but do introduce those pollutants into the navigable waters."

In nonetheless urging reversal of the judgment below, the Solicitor General embraces a construction of Section 402 that is no more tethered than is petitioner's to the statute's plain meaning and EPA's settled administrative implementation. He argues (Merits Br. 12) that Section 402 does not apply to facilities that "do no more than convey or connect navigable waters." Because "the S-9 pumping station transports 'waters of the United States' that already contain pollutants from one location to another; it does not add pollutants to 'the waters of the United States.'" *Id.* at 13. It "merely

transports navigable waters from one location to another." *Id.*

Although different from petitioner's argument, the Solicitor General's proposed construction would seriously undermine the Clean Water Act's ability to achieve its essential water protection goals. Adoption of his argument would not incidentally reduce the scope of Section 301's ban on point source discharges and the Section 402 permit program. The meaning of "navigable waters" in the Clean Water Act goes far beyond traditional navigable waters to extend at the very least to wetlands and nonnavigable tributaries, including ditches and channels, that can be far removed from traditional navigable waters. See U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); U.S. v. Deaton, 332 F.3d 698 (4th Cir. 2003); 33 C.F.R. § 328.3. Under the Solicitor General's reading, all discharges between such waters would be exempted from Sections 301 and 402.

The Solicitor General's most obvious legal error lies in his repetition of petitioner's own: the erroneous assumption that whether a point source discharge exists turns on the origins of the input into the point source rather than exclusively on the nature of the point source's output. As shown above (p. 6-7, *supra),* the statutory definition of "discharge of a pollutant" clearly focuses exclusively on the latter. There is absolutely nothing within the plain meaning of Section 502(12)'s definition of "discharge of a pollutant" to suggest that it is legally relevant whether the waters in which those pollutants are being conveyed were previously "navigable."

The Solicitor General tries mightily to suggest otherwise, but only by way of rhetorical subterfuge that is unavailing. First, he tries to recharacterize what is indisputably a point source that is actively "conveying" high concentrations of pollutants into a navigable water body into a mere passive "connect[ion]" between two bodies of navigable waters. Petitioner's three pipes, however, are no mere passive connection. They are a "conveyance," which, unlike "connection" is a precise statutory term of art. To the

Solicitor General, it may be a "mere" conveyance (Br. 16), but for the drafters of the Water Act, the act of "conveyance" is what makes petitioner's pipes a point source discharge.

Second, the Solicitor General repeatedly refers (Br. 13) to petitioner's pipes as conveying "navigable waters" or, using the statutory definition of that term of art, "waters of the United States." See 33 U.S.C. § 1362(7). It is entirely misleading, however, to say that petitioner's pipes are conveying "navigable waters" because that characterization presumes the legal relevance of the fact that the waters contained in the pipe were once present in a navigable water body. The pipes do not convey "navigable waters." What they convey is "water." And, just as with any other point source, when the water being conveyed contains pollutants that are being directly added to a navigable water body in which the pollutants did not previously exist, such a conveyance is a point source discharge.

To be sure, it can be relevant whether the receiving waters are the *same* water body from which the point source originally withdrew water. But that is not because the navigability of those originating waters is relevant, but only because a discharge back into the same water body would raise a question whether an "addition" of pollutants was in fact occurring. If the discharge was doing no more than simply reintroducing pollutants that had previously been in the receiving waters, it might well be that an "addition" was not occurring.

Even if, however, there were any statutory ambiguity (which there is not), the Solicitor General's views would not be entitled to heightened judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). EPA is the only federal agency possibly entitled to *Chevron* deference in the construction of the Water Act terms at issue here and, in an authoritative interpretation, the EPA General Counsel has specifically and unambiguously rejected the views presented by the Solicitor General.

Prior to Congress's decision in 1977 to exclude irrigation return flows from the scope of point source regulation, EPA was faced with the question whether such flows amounted to a point source. The EPA General Counsel answered that question in a formal decision issued on June 27, 1975, after providing opposing parties with an opportunity to brief the legal issue. See *In Re Riverside Irrigation District, Ltd and 17 Others*, Decision of the General Counsel No. 21 (June 27, 1975), *reprinted in* U.S. EPA General Counsel Opinions (Envt'l Law Pub. Serv. 1979). Not surprisingly, the General Counsel concluded that irrigation return flows clearly amounted to point sources under the statute's plain meaning, specifically rejecting each legal argument raised by petitioner here.[7]

But what is most striking about the EPA General Counsel's 1975 formal ruling is that he specifically *rejects* the very same construction of the Clean Water Act that the Solicitor General sets forth in his amicus brief in this case. One of the arguments raised in the 1975 proceeding by those claiming that the Section 402 permit requirement did not apply to irrigation return flows into navigable waters was that the irrigation ditch could itself be considered a navigable water and therefore it could not be deemed to be adding pollutants even when discharging to another navigable water. That is of course precisely what the Solicitor General is arguing before this Court.

---

[7] The General Counsel found that "irrigation activity" resulting in pollutants being discharged into navigable waters from a discrete conveyance is subject to Section 402 and he rejected the argument, repeated here, that contaminants once in water are no longer "pollutants," but instead "pollution." *In Re Riverside Irrigation District, supra.* Of course, Congress in 1977 subsequently decided expressly to exempt irrigation return flows from the definition of "point source" (see 33 U.S.C. § 1362(14)), but that exclusion does not undermine the correctness of the General Counsel's interpretation of the statutory language as it continues to apply to all other types of point sources after 1977. Quite the opposite. See page 8-9 & n.3, *supra.*

The EPA General Counsel, however, squarely rejected that contention. He found that "to define the waters here at issue as navigable waters and use that as a basis for exempting them from the permit requirement appears to fly directly in the face of clear legislative intent to the contrary." *In Re Riverside Irrigation District, supra.* The General Counsel stressed, with emphasis in his original opinion, "what is prohibited by section 301 is '*any addition* of *any pollutant* to navigable waters from any point source." *Id.* And, finally, removing any possible doubt as to his intent that there is absolutely no merit to the Solicitor General's position in this case, the EPA General Counsel closed as follows:

> It is therefore my opinion that, *even should the finder of fact determine that any given irrigation ditch is a navigable water, it would still be permittable as a point source where it discharges into another navigable water body,* provided that the other point source criteria are also present.

Id. (emphasis in original and emphasis added).

Perhaps the stark disparity between the General Counsel's longstanding views and those expressed by the Solicitor General in this case is why the names of no EPA attorneys appear on the Solicitor General's brief expressing the views of the "United States" on the meaning of a statute administered by EPA. But whatever the reasons for that striking absence, only the views of the EPA General Counsel in a formal decision, rather than those expressed in a Solicitor General brief, could be entitled to *Chevron* deference.

The EPA General Counsel's 1975 decision was, moreover, the product of defined administrative agency procedures that allowed important legal issues to be certified to the General Counsel for careful consideration and resolution. In contrast to a brief filed in the course of litigation, such as that submitted by the Solicitor General in this case, the General Counsel's ruling is precisely the kind of exercise of

legislatively delegated lawmaking authority (see 33 U.S.C. § 1342(a)(1)) that has the "force of law" for which *Chevron* deference applies in the event of statutory ambiguity. United States v. Mead Corp., 533 U.S. 218, 231, 234 (2001).[8]

II. Petitioner's Reliance On "Principles of Statutory Interpretation" To Defeat The Clean Water Act's Plain Meaning Is Misplaced

Although petitioner purports to acknowledge (Br. 26) that "[t]he starting point for interpretation is the language of the statute itself," it is well past the mid-point of its brief before petitioner even attempts to discuss the relevant language. Then, spending little more than four pages of its 49-page submission on that language, petitioner ultimately seeks refuge not in its plain meaning, but in a series of so-called "ordinary principles of statutory interpretation" (Br. 34). Petitioner claims (1) federalism concerns demand a "clear statement" to support "stripping the States of their traditional powers"; (2) the "rule of lenity" requires a narrow construction to avoid unfair criminal prosecutions; and (3) plain meaning should be ignored when it would "lead to absurd and disastrous results."

Petitioner's argument fails for two fundamental reasons. First, none of these "principles of statutory interpretation" can overcome the overriding principle that the judicial inquiry ends when the meaning of a statute is plain. And, second, none of the varied policy concerns petitioner raises in support of the application of these purported "principles" would in fact be implicated by subjecting petitioner's point sources to Section 402 permitting requirements.

A. The Plain Meaning Of A Statute Is Controlling

Petitioner commits a basic error in positing that this Court

---

[8] Indeed, it is the position of the EPA *and the Solicitor General* that, under this Court's precedent, *Chevron* deference to EPA is warranted in just these kinds of permit adjudications. See Brief for EPA, Alaska v. EPA, No. 02-658, p. 41.

should turn to petitioner's proposed "principles of statutory interpretation" and on that basis rule that Section 402 does not apply to its conveyance of polluted effluent into navigable waters. None of those principles applies where, as in this case, the statute possesses a plain meaning as applied to the factual circumstances of the case.

Accordingly, in *Salinas v. United States*, 522 U.S. 52 (1997), this Court explained that the "clear statement" rule, under which Congress "will not be deemed to have significantly changed the federal-state balance" absent such a statement, has no continuing force when the statute is unambiguous. "Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature." *Id.* at 59. Petitioner's reliance on the rule of lenity is equally misguided. "[T]he rule of lenity applies only when an ambiguity is present; 'it is not used to beget one * * *. The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.'" National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 262 (1994), *quoting*, U.S. v. Turkette, 452 U.S. 576, 587-88 n.10 (1981).

Moreover, "[b]road general language is not necessarily ambiguous when congressional objectives require broad terms." Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980). "'[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" PGA Tour, Inc. v. Martin, 532 U.S. 661, 689 (2001), *quoting* Pennsylvania Dept. of Corrections v. Yesky, 524 U.S. 206, 212 (1998).

The Clean Water Act's breadth is no mere happenstance. As described by this Court, the Clean Water Act "constituted a comprehensive legislative attempt 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" U.S. v. Riverside Bayview Homes, 474 U.S.

121, 132 (1985). "This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality * * * Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[water] moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'" *Id.* at 132-33, *quoting* S. Rep. No. 92-414, 92nd Cong., 2d Sess. 77 (1972). Petitioner's suggested exception, therefore, would directly undermine congressional intent by eroding the comprehensiveness of the single most effective aspect of the statute: the Section 402 permit program.

B. Application of the Clean Water Act According To Its Plain Terms Neither Raises Serious Federalism Concerns Nor Otherwise Leads To Any Absurd Or Disastrous Consequences

Petitioner and their supporting amici are also wrong in suggesting that this Court should ignore the Clean Water Act's plain meaning because none of the various policy concerns they raise is in fact implicated by the decision below. Affirmance of the lower court's judgment will not transgress state sovereignty and it will not impose massive burdens, if any, on water allocation systems.

1. The Clean Water Act, Including Section 402, Directly Incorporates Rather Than Transgresses State Sovereign Prerogatives

Petitioner's heavy emphasis on principles of federalism at the expense of the relevant statutory language starts from the false premise that the Clean Water Act is administered exclusively by the federal government to the persistent subjugation of the States. As this Court has previously explained, however, the Clean Water Act establishes a "regulatory 'partnership'" between the federal government and the States. See International Paper Co. v. Ouellette, 479 U.S. 481, 490 (1987). In myriad ways, the Act recognizes the important role that States should and do play in water pollution control.

Indeed, the major role played by the States extends to virtually all aspects of the Section 402 permit program, especially as that program relates to the kind of point source discharges present in this case. First, as described by this Court in *International Paper Co. v. Ouellette*, 479 U.S. at 489, "[t]he Act provides that the Federal Government may delegate to a State the authority to administer the NPDES program with respect to point sources located within the State, if the EPA Administrator determines that the proposed state program complies with the requirements set forth at 33 U. S. C. § 1342(b)." Currently, 47 out of the 50 States are doing just that: they are the primary permitting agencies pursuant to Section 402(b).[9] Because Florida is just such a state, were this Court to affirm the judgment below, it would not be EPA that would be primarily responsible for deciding the content of petitioner's Section 402 permit. It would be a fellow Florida state agency. See note 11, *infra*.

Nor are State permitting agencies mere instrumentalities of the federal government. They exercise considerable independent lawmaking authority. The kinds of point source discharges at issue in this case are, moreover, not within the narrower category of industrial point sources for which Congress asked the Administrator to promulgate nationally uniform technologically-based effluent limitations. See 33 U.S.C. §§ 1311(b), 1314(b); E.I. DuPont de Nemours & Co. v. Train, 430 U.S. 112 (1977); EPA v. National Crushed Stone Ass'n, 449 U.S. 64 (1980). Accordingly, for a source like petitioner's, it would be the responsibility of the State permitting agency to use its "best professional judgment" to craft appropriate permit requirements. See 33 U.S.C. § 1342(a); 40 C.F.R. § 122.44(a).

The other statutory basis for effluent limitations within a

---

[9] See National Pollutant Discharge Elimination System, Website of U.S. EPA, http://cfpub.epa.gov/npdes/statestats.cfm (accessed October 27, 2003).

Section 402 permit is even more within the discretionary authority of the States. The effluent limitations imposed by Section 402 permits must also guard against violation of State water quality standards. See 33 U.S.C. §§ 1311(b)(1)(C), 1313(a) & (d). But, as the Clean Water Act makes clear, it is *State* water quality standards that govern this federal requirement. The States possess the primary responsibility for determining state water quality standards and, where the State agency is the permitting authority, to determine how to allocate effluent between several sources to ensure that state standards are met. See 33 U.S.C. § 1313(a)-(d); 33 U.S.C. § 1313(c); Public Utility Dist. No. 1 v. Washington Dept. of Ecology, 511 U.S. 700 (1994). Unlike for the Clean Air Act, 42 U.S.C. § 7409, there are no generally applicable nationally uniform ambient standards applicable to all waters.

2. Subjecting Petitioner's Pumping Station to Section 402 Would Not Lead To Massive Administrative Burdens On State Authorities

While studiously avoiding its origins within this Court's precedent, petitioner and its amici ultimately turn to the last refuge of those seeking to persuade the Court to ignore the clear statutory language in favor of a construction that petitioner contends would lead to a more sensible policy: the "absurd result" canon most famously set forth in *Church of Holy Trinity v. United States*, 143 U.S. 457 (1892). See The Honorable Antonin Scalia, A Matter of Interpretation, 18 (1997). Petitioner, joined by its amici, accordingly unleash their own veritable floodgates of horrible results, prophesizing an administrative cataclysm or bureaucratic doomsday should the Court affirm the judgment below.

It should be sufficient, of course, simply to restate the obvious: the plain meaning of the statute must prevail, especially where, as with the Clean Water Act, Congress so carefully defined the relevant terms and otherwise made plain in a host of provisions throughout the Act its rejection of petitioner's preferred policies. But, it is important

nonetheless to make clear that petitioner's exaggerated rhetoric is only that: exaggerated rhetoric.

At the outset, the vast majority of water allocation management consists simply of diverting water *away* from a body of water. Although such withdrawals of water clearly have water quality impacts, there is no question that withdrawals do not constitute "discharges" and they are accordingly not subject to Section 402 notwithstanding those impacts. So too, Congress has already decided specifically to exempt from Section 402 permitting requirements the single largest source of pollution from water allocation activities that would otherwise satisfy the statute's definition of "discharge," which is irrigation return flows. See 42 U.S.C. §§ 1342(l)(1), 1362(14).

Nor is there reason to suppose that all water allocation activities that divert water from one basin to another will be subject to NPDES permit requirements. To the extent that the waters involved, unlike those here, can be fairly treated as the same waters, we do not herein dispute that EPA could fairly conclude, as it has done for dams, that no "addition" is occurring within the meaning of Section 502(12).[10] For

---

[10] At the jurisdictional stage in this case, the Solicitor General heavily relied (Juris. Br. 11) on the viability of the distinction historically made by the federal courts of appeals between "two situations": (1) "when a water control facility, such as a dam or pump, directs the flow of water from one part of a single water system to another part of the same system," which "does not result in an 'addition' of a 'pollutant,' and (2) "when a water control facility transfers polluted water from one distinct and separate body of water to another less-polluted body of water," which does "result[] in an 'addition' of pollutants to the more pristine body of water, and an NPDES permit is therefore required." Whatever the reasons for the Solicitor General's dramatic shift of opinion between the brief filed at the jurisdictional stage last May and the brief submitted on the merits just a few weeks later in September, we believe he got it right the first time on the viability of the distinction.

many dams, there may be merely "water that passes through," warranting the conclusion that the receiving waters are the same as the intake waters. See U.S. Merits Br. 24 n.10. But the Solicitor General is simply wrong in equating (*id.*) that activity of dams with the operation of the pumps at issue here. Petitioner's pipes do not simply allow water to "pass through." They take massive amounts of contaminated water and deliberately discharge them for the purpose of disposal into a distinct navigable water body to which they would not otherwise have flowed.

We are likewise confident that EPA possesses considerable discretion in interpreting the meaning of "discharge of a pollutant" as applied to water allocation activities, unlike those present here, that are truly aimed at allocating water supplies to satisfy human consumptive needs. Such classic transbasin diversions invariably involve moving pristine water to join waters that are not so pristine, not vice versa. For such activities that are in fact doing no more than moving water, there may well be ambiguity in terms of the application of Section 402 and, for that reason, EPA may well possess some discretion under *Chevron* to advance a reasonable construction of the Act that exempts some of those water allocation activities.

But the theoretical possibility of some ambiguity in the application of the statute in other factual circumstances lends absolutely no support to petitioner's claim that either the Act's plain meaning exempts petitioner from Section 402 or there is sufficient ambiguity to support an sweeping administrative exemption for all "water movement." Petitioner is not moving water for human consumptive purposes. Petitioner is not moving pristine water to a less pristine area. Nor is petitioner simply moving water within the same navigable body of water. Petitioner is discharging massive amounts of water from one area to get rid of it and is using a distinct water body as nothing more than a disposal site for its discharges of water and phosphorous.

This is nothing less than a classic Section 402 discharge.

Nor are petitioner and their amici correct in their assertion that subjecting similar discharges to Section 402 will impose massive administrative burdens on state and local water management activities. As described by the amicus brief filed by the Solicitor General at the Court's invitation at the jurisdictional stage (Juris. Br. 11), every court of appeals to address the status of such water transfers had previously reached precisely the same result as did the Eleventh Circuit below. The upshot of those longstanding judicial rulings has not been the widespread havoc now predicted by petitioner.

The reasons are several. As explained by the Solicitor General in his initial filing in this case, the considerable flexibility offered within the Clean Water Act would likely render "relatively modest" any possible resulting administrative burden even as applied to this case:

> For example, the permitting authority in this case--the Florida Department of Environmental Protection--may be able to issue a general permit that considerably streamlines the permitting process. See 40 C.F.R. 122.28, 123.25. Furthermore, an NPDES permit can provide considerable flexibility in any schedules for compliance. See 40 C.F.R. 122.47. And it appears at least questionable that the NPDES permit would subject petitioner to any significant environmental obligations beyond those that petitioner already faces under other existing laws.

U.S. Juris. Br. 17 (jurisdictional stage).

Hence, even under the most far reaching interpretation of "discharge of a pollutant," State permitting agencies would not have to issue hundreds of thousands of individual permits for water allocation activities for the same reason that they already do not have to do so for many other comparable activities regulated by Section 402. As long ago

described by the D.C. Circuit in *NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977), and as since routinely performed by both EPA and State permitting agencies pursuant to Section 402, the agency can instead issue, within reasonable bounds, general or areawide permits that authorize an entire category of activities. See, *e.g.*, *Final National Pollutant Discharge Elimination System General Permit for Storm Water Discharges from Construction Activities*, 68 Fed. Reg. 39087 (2003).

For similar reasons, petitioner's claim (Br. 40-42) that application of Section 402 to its pumping station will disrupt otherwise comprehensive state water management programs applicable to the Florida Everglades is a complete red herring. If such laws do in fact exist and adequately address the issue, then as the Solicitor General explained at the jurisdictional stage, Section 402 will not impose any additional significant burdens and will instead simply easily integrate itself into state programs as necessary to ensure protection of water quality based on state water quality standards. Indeed, as described by respondents in their brief (see Resp. Miccosukee Tribe Br. IIIA) and as revealed by publicly available documents,[11] it appears that petitioner is already subject to and complies with Clean Water Act Section 402 and 404 permits in many of its water management activities, including some closely related to those at issue in this case. There is, accordingly, no stark divide between Everglades management and the Clean Water Act.

But, of course, because petitioner is advancing a sweeping

---

[11] See,*e.g.*, Website of the South Florida Water Managment District, http://www.sfwmd.gov/org/wrp/wrp_evg/projects/404permit (Nov. 7, 2003) (describing Section 404 permit); Website of the Florida Dept. of Envt'l Protection, http://www.dep.state.fl.us/legal/legal documents/finalorders/1999/DEP99-0385.doc (Nov. 7, 2003) (Florida DEP final emergency order describing Section 402 permits applicable to Everglades nutrient removal project undertaken pursuant to stormwater treatment and Everglades Construction Project).

interpretation of the statute that would apply nationwide in all circumstances, the precise adequacy of Florida's other programs is wholly irrelevant. For, if petitioner is correct that Section 402 does not apply to its kind of water discharge activity, that would be equally true in jurisdictions that have *absolutely no* other programs at all apart from their administration of Section 402.[12]

In sum, the Clean Water Act does not impose some sweeping exemption for all pollutants conveyed by the movement of water no matter what the nature and impact of that movement. The Act instead provides sufficient clarity within its terms to identify discharges that, like petitioner's, are no different in their character from a classic industrial discharge, while maintaining sufficient flexibility within its requirements to guard against imposing unduly burdensome administrative requirements on state water management agencies for all their authorized activities.

III. Petitioner's Sole Recourse Is To Persuade Congress Of The Merits Of Their Policy Arguments

Given the plain meaning of the Clean Water Act, as bolstered by its structure, longstanding administrative

---

[12] Significantly, the experience of other States has demonstrated the potentially substantial value of subjecting some water transfers to Section 402. For instance, in *Del-Aware Unlimited, Inc. v. Pennsylvania*, 1984 Envtl' Hearing Bd. 178 (1984), the Pennsylvania Environmental Hearing Board considered whether a Section 402 permit was required for a state water project that would convey substantial amounts of water from the Delaware River to a distinct navigable body of water that the Delaware River would not otherwise reach. The Board ruled that Section 402 should apply because otherwise the State Department of Environmental Resources "would have no right to establish pollutant concentration limits for discharges of the Delaware into the Neshaminy or Perkiomen, no matter how polluted the Delaware or how pristine the receiving streams; we do not believe this outcome would be consistent with Congress' intent when it passed the Federal Clean Water Act." *Id.*

interpretation, and subsequent congressional amendment, petitioner's request for relief can be fairly characterized as an invitation for judicial amendment of a statute. The Court should soundly decline the invitation.

It is well established that this Court is "without competence to entertain these arguments – either to brush them aside as fantasies generated by fear of the unknown, or to act on them." Diamond v. Chakrabarty, 447 U.S. 303, 317 (1980). Resolution of such policy disputes "involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on [the Court] should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts." *Id.* "[C]ourts 'are not at liberty to create an exception where Congress has declined to do so.'" Freytag v. C.I.R., 501 U.S. 868, 874 (1991), *quoting* Hallstrom v. Tillamook County, 493 U.S. 20, 27 (1989).

Certainly, based on the identity of the amici filing in support of petitioner, there is no reason to suppose that those supporting petitioner's preferred policy will be unable to have their voices heard by Congress should the Court affirm the judgment below based on the Clean Water Act's plain meaning. As previously described, we do not believe that there is any plausible basis for believing that affirmance will have any major adverse impact on water management nationwide, and will instead simply bolster water pollution control in those instances where regulatory gaps apparently persist. Certainly, the fact that no such massive burden has developed over the years in the face of multiple courts of appeals reaching the same result as the court below in this case, is weighty testimony in favor of our view.

But even if, contrary to our submission, problems do arise, these same entities can make their case heard by their elected representatives. Congress has certainly not exhibited any past reluctance to narrow the Clean Water Act when

persuaded that it would be sound public policy. Congress, accordingly, has exempted from Section 402 irrigation return flows and stormwater runoff from oil, gas, and mining activities. See 33 U.S.C. §§ 1342(l), 1362(14). The legislators have similarly fine-tuned the application of Section 402 to municipal and industrial stormwater discharges. See *id.* § 1342(p). Indeed, the Act is replete with statutory revisions made by Congress based on the lessons learned from the Act's actual implementation, rather than on a litigant's exaggerated rhetoric and hypothetical parades of horribles.[13]

No constitutional shortcut exists for achieving legislative change. Individual citizens and the politically powerless must follow the constitutional pathways for securing law reform, no matter how high the hurdles. These same rules must equally apply to captains of industry and to powerful state and local executive branch governmental entities.

CONCLUSION

For the forgoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

RICHARD J. LAZARUS
COUNSEL OF RECORD
GEORGETOWN UNIVERSITY LAW CENTER
600 NEW JERSEY AVENUE, N.W.
WASHINGTON, D.C. 20001
(202) 662-9129
Attorney for Amici

NOVEMBER 2003

---

[13] See, *e.g.*, 33 U.S.C. §§ 1311(g) (modification provisions for certain nonconventional pollutants), 1311(h) (modification provisions for secondary treatment), 1311(i) (municipal time extensions).

APPENDIX

Description of Amici Curiae

Carol M. Browner was appointed by President William Jefferson Clinton, Administrator of the United States Environmental Protection Agency and unanimously confirmed by the United States Senate in January, 1993. She served in the position for eight years, longer than other EPA Administrator. Ms. Browner also worked closely with the White House to secure passage of the first ever comprehensive law to protect the Everglades. Prior to her appointment to EPA, Ms. Browner served as Secretary of the Environment for the State of Florida.

Jonathan Z. Cannon served as General Counsel of the United States Environmental Protection Agency from 1995 to 1998 and as Assistant Administrator for Administration and Resource Management for the Agency from 1993 to 1995.

Charles Fox served as Assistant Administrator for Water of the United States Environmental Protection Agency from July 1998 through January 2001. He also served as Secretary of the Maryland Department of Natural Resources from August 2001 through January 2003.

Jean C. Nelson served as General Counsel of the United States Environmental Protection Agency from 1993 to 1995.

Robert W. Perciaepe served as Assistant Administrator for Water of the United States Environmental Protection Agency from 1993 to 1998. He served as Assistant Administrator for Air and Radiation from 1998 to 2001.